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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

NO. 393

ROBERT B. BAKER, Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND APPENDIX

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NO. ....

ROBERT B. BAKER, Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, affirming his conviction for violation of Section 302 (b) of the Labor Management Relations Act of 1947; 29 U. S. C. 186 (b).

OPINIONS BELOW

The opinion of the District Court denying petitioner's motion for judgment of acquittal is reported at 189 F. Supp. 796. The opinion of the Court of Appeals has not yet been reported. (App. 1a).

JURISDICTION

The judgment of the Court of Appeals was entered on July 14, 1961, and the petition for rehearing was denied on August 9, 1961 (App. 12a). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254.

QUESTIONS PRESENTED

1. Whether the testimony of defendant before the Senate Committee on Improper Activities in the Labor or Management Field was improperly admitted in contravention of Title 18 U. S. C. 3486.

2. Whether the Courts below improperly applied the decisions in *Opper v. United States,* 348 U. S. 84, and *Smith v. United States,* 348 U. S. 147, in distinguishing admissions before a Congressional Committee from other types of admissions.

3. Whether compelled testimony of a defendant under subpoena by the Senate Committee on Improper Activities in the Labor or Management Field may be used against him in a subsequent criminal prosecution.

STATUTES INVOLVED

Section 302(b) of the Labor Management Relations Act of 1947 provides as follows:

> "It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value."

The Act of June 25, 1948, c. 645, 62 Stat. 833, 18 U. S. C. 3486 provides as follows:

> "No testimony given by a witness before either House, or before any committee of either House, or before any joint committee established by a joint or concurrent resolution of the two Houses of Congress, shall be used as evidence in any criminal

proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony. But an official paper or record produced by him is not within the said privilege."

The Act of August 20, 1954, c. 769, Section 1, 68 Stat. 745, 18 U. S. C. 3486, provides as follows:

"Title 18, United States Code, Section 3486, is amended to read as follows:

'§3486. Compelled testimony tending to incriminate witnesses; immunity

(a) In the course of any investigation relating to any interference with or endangering of, or any plans or attempts to interfere with or endanger the national security or defense of the United States by treason, sabotage, espionage, sedition, seditious conspiracy or the overthrow of its Government by force or violence, no witnesses shall be excused from testifying or from producing books, papers, or other evidence before either House, or before any committee of either House, or before any joint committee of the two Houses of Congress on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture, when the record shows that— . . . .'"

"Sec. 2. The analysis of chapter 223 of title 18, United States Code, is amended by striking out

'3486. Testimony before Congress; immunity.'

and inserting in lieu thereof the following:

'3486. Compelled testimony tending to incriminate witness; immunity.'"

STATEMENT

Petitioner was indicted, tried and convicted in the United States District Court for the Western District of Pennsylvania on a three count indictment charging a violation of Section 302 (b) of the Labor Management Relations Act of 1947. This statute interdicts the passage of money or other thing of value between a representative of employees engaged in an industry affecting commerce and the employer of such employees.

The indictment alleged that petitioner was a representative of employees of Exhibitors Service Company who were engaged in an industry affecting commerce. Count 1 charged the petitioner with obtaining the sum of $100.00 from George F. Callahan, Jr., President of Exhibitors Service Company, on or about the 21st day of December, 1957. Count 2 charged petitioner with obtaining the sum of $125.00 from George F. Callahan, Jr., President of Exhibitors Service Company, on or about the 28th day of December, 1957, and Count 3 charged the petitioner with obtaining the sum of $300.00 from said George F. Callahan, Jr., on or about the 29th day of January, 1958.

The government introduced evidence tending to establish the following facts:

Petitioner, Baker, was an organizer for the Central Conference of Teamsters and worked under the supervision of James R. Hoffa and Harold Gibbons. The witness Hoffa testified that the employees of Exhibitors Service Company were members of the Eastern Conference of Teamsters and that the petitioner had no authority to come into the Eastern Conference; that as an organizer he had no authority to make any settlements

or enter into any matters regarding wages, conditions and hours of employment.

The employees of Exhibitors Service Company were involved in a jurisdictional dispute between two locals of the International Brotherhood of Teamsters. Negotiations between the employees and the local union were unsuccessful. In December, 1957 petitioner met with the President of Exhibitors Service Company, George F. Callahan, Jr. Mr. Callahan testified that he loaned petitioner various sums of money and that petitioner promised to do what he could to arrange a meeting between the local union representatives and management. The meeting was arranged and subsequently the strike was settled.

The petitioner testified before the Senate Committee in August, 1958. The indictment was returned September 21, 1959. The evidence to establish petitioner's representative status was his own testimony before the Senate Committee on Improper Activities in the Labor or Management Field, which testimony was introduced in evidence at the trial, over petitioner's objection.

At the conclusion of the government's case, petitioner moved for judgment of acquittal on the ground, inter alia, that the prosecution had failed to prove that petitioner was a representative of the employees of Exhibitors Service Company. This motion was denied and petitioner introduced evidence of various local union officials to establish that petitioner was not a representative of the employees of Exhibitors Service Company.

The jury returned a verdict of guilty under all counts of the indictment. The petitioner was sentenced to imprisonment for a period of one year (the maximum

prison term allowed by Section 302 of the Labor Management Relations Act of 1947) on Count 1 and to pay a fine of $400.00; imprisonment for a period of one year and a fine of $400.00 on Count 2; and imprisonment and a fine of $400.00 on Count 3, all sentences to run consecutively, but the prison term imposed at Count 3 was suspended and petitioner was placed on probation for a period of five years, on condition that the fines and costs be paid.

The Third Circuit subsequently affirmed petitioner's conviction. It held that there was sufficient corroboration of petitioner's representative status to permit the introduction in evidence of his admissions before the Senate Committee on Improper Activities in the Labor or Management Field. It further held that the Act of August 24, 1954, 68 Stat. 745, 18 U. S. C., 1958 ed., Section 3486 superseded the Act of June 25, 1948, 62 Stat. 833, 18 U. S. C., 1952 ed., 3486.

REASONS FOR GRANTING THE WRIT

This case raises the issue as to whether the Act of 1954, 68 Stat. 745, 18 U. S. C., 1958 ed., Section 3486 repealed the existing Immunity Act of 1948 or simply was an amendment thereto. This issue was neither raised nor answered by the decision of this Court in *Ullman v. United States*, 350 U. S. 422. The widespread activity of Congressional committees makes it essential that this Court clarify the potential use of the testimony of the witness before such committee in subsequent criminal prosecutions. It also raises the issue of whether the Court of Appeals for the Third Circuit has narrowed the applicability of *Opper v. United States*, 348 U. S.

84, and *Smith v. United States,* 348 U. S. 147, so as to require less corroboration prior to the introduction in evidence of the admissions before a Senate committee than is required for the introduction in evidence of admissions made to law enforcement agents or others. It further raises the issue of whether compelled testimony by a witness subpoenaed before a Senate committee may be used against him in a subsequent criminal prosecution.

1. Petitioner's principal defense in this case was that, as an organizer for the Central Conference of Teamsters, he was not a representative within the meaning and intent of Section 302 (b) of the Labor Management Relations Act of 1947. To establish this necessary element, the prosecution had to rely on the testimony of the petitioner before the Senate Committee on Improper Activities in the Labor or Management Field. It is clear that the Immunity Act of 1948 prohibits the use of the testimony of a witness before a Congressional committee in any criminal proceeding against such witness in any court. *Adams v. Maryland,* 347 U. S. 179. The Court of Appeals held, however, that the 1948 statute was superseded and not supplemented by the Act of 1954. The Act of 1948 was a general immunity statute. The amendment by the Act of 1954 added thereto provisions not here material relating to Congressional investigations concerning national security and seditious conduct. The legislative history of the Act of 1954 and Section (a) thereof indicate the intent of Congress to enact legislation to compel the testimony of witnesses in the course of investigations relating to any interference with or endangering of the national security or defense of the United States by treason,

sabotage, espionage, sedition, seditious conspiracy or the overthrow of the government by force or violence.

That Congress did not intend to repeal the Act of 1948 is evidenced by the fact that the amendment to the Act commences with sub-divisions (a), (b), (c) and (d) and adds a separate section to the original Act referred to as section 2. It is apparent, therefore, that there had to be a section 1 to this Act to which the subdivisions attached and which could numerically be followed by section 2. A reference to the opening sentence of the amendatory Act clearly indicates that Title 18, United States Code, section 3486, *is amended* and, therefore, not repealed. Had Congress intended a repealer of the earlier Act it would have so stated in unmistakable terms.

The amendment of 1954 was the enactment of a specific immunity statute concerning a limited field of Congressional, grand jury and court investigations involving interference with national security. It did not cover the same subject matter as the Act of 1948, which granted general immunity to witnesses. The debates, as disclosed by the Congressional Record, concerning the Act of 1954 indicate the purpose of the Act. Senator McCarran, the leading expondent of the immunity statute, in Volume 99, part 5 of the Congressional Record, page 6172, stated as follows:

> "Mr. President, this bill has been much discussed, and I believe most Senators are familiar with it. Its purpose is to close a loophole in the existing statute ineffective for the purpose of requiring the testimony of a witness who may claim his privilege under the Fifth Amendment, and thus

to effectuate the purpose of that statute, by putting the Congress and its committees in a position to require the testimony of such a witness by giving him, in exchange for his testimony, an immunity from prosecution equal to the scope of his privilege under the Fifth Amendment. I wish to say at this time merely that this bill is particularly important in the investigation of Communism. About the only way we are ever going to get to the bottom of the Communist conspiracy in this country is by securing the testimony of some of those who were themselves a part of that conspiracy."

Senator McCarran repeats the above argument in favor of the bill in Volume 99, part 6, page 7990 of the Congressional Record. The same argument is contained in Volume 99, part 6 of the Congressional Record at page 8341.

In the House Debates Volume 100, part 10, page 13,323, Representative Keating, speaking on behalf of the bill, stated:

"Mr. Speaker, this bill is a very important piece of legislation to further the struggle against Communist conspiracy on all fronts in the activities of investigating committees representing the legislative arm of Government and in the prosecutive functions carried on through the executive branch. It is certainly in our national interest to give our investigating committees and our prosecutors a means of loosening the tongues of important witnesses who resist all inquiries into their activities by taking refuge behind the Fifth Amendment . . . Now, there is another very important respect

in which this bill as reported for action today differs from the bill passed in the other body and also differs from the original administration-endorsed measure H. R. 6899, and that is this:

> An amendment was offered and accepted by the Committee . . . which limited the operation of this entire procedure to crimes involving the national security so that this bill as now worded and now before us exclusively applies only to investigations dealing with or prosecutions for the crimes of treason, sabotage, espionage, sedition, seditious conspiracy, and violations of certain specific statutes, all of which deal with the Communist conspiracy. It is, therefore, a very much narrower bill than originally offered."

And on page 13,324 Representative Walter reiterated what Representative Keating had already stated, to-wit:

> "This bill has been amended so that its operation is limited to cases of national security."

The Act of 1954 does not expressly by words repeal the Act of 1948. In *Leitz v. Fleming,* 264 F. 2d 311 (1959), cert. den. 361 U. S. 820, it was held:

> "The law is well settled that repeals by implication are not favored. Where two acts cover the same subject matter both should be given effect if possible. Posadas v. National City Bank, 296 U. S. 497, 56 S. Ct. 349, 80 L. Ed. 351. Furthermore, if effect can reasonably be given to both statutes, the presumption is that the earlier is intended to remain in effect. United States v. Burroughs, 289 U. S. 159, 53 S. Ct. 574, 77 L. Ed. 1096. To repeal

> a prior Act there must be a positive repugnancy between the provisions of the new law and those of the old; and even then the old law is repealed by implication only pro tanto to the extent of repugnancy . . . In order for an amending statute to operate as a repeal of the earlier Act, the intention of the legislature to repeal must be clear and manifest; otherwise, the latter Act is to be construed as a continuation of, and not a substitute for, the first Act and will continue to speak, so far as the two Acts are the same, from the time of the first enactment."

See also *United States v. Toy,* 273 F. 2d 625, 628 (footnote 8).

The Act of 1948 is a general immunity statute concerning the testimony of a witness before Congressional Committees only. The amendment of 1954 relates to specific activities enumerated in said amendment concerning national security and concerns the compelling of testimony; that is, the involuntary testimony of a witness not only before Congressional committees but before the grand jury and the court. The Act of 1948 confers general immunity to testimony before a Congressional committee without any action on the part of the committee. The Act of 1954 concerns granting of immunity by affirmative action on the part of the Government after a witness has claimed the Fifth Amendment. It is apparent that the amendment of 1954 does not cover the same subject matter and differs in scope, procedures, intent and in the time, place and method of application.

The Act of 1948 and its amendment of 1954 are not antagonistic to each other and do not cover the same

immunity provisions. The amendment of 1954 removes specific matters from the operation of the general immunity statute.

There are innumerable examples where Congress, intending to repeal certain legislation, has specifically and clearly expressed that intention. For example, in U. S. Code Congressional and Administrative News, Special Pamphlet No. 14, page 3544, issued September 15, 1960, various sections of titles in the United States Code which have been repealed may be found. Congress knows how to repeal an act or a section of an act. It has not done so by the amendment of 1954.

The effect of the decision of the Court of Appeals is to hold that Congress intended to give immunity only to Communists and other subversives and saboteurs while denying immunity to all other citizens not engaged in Communist and subversive activity. It is inconceivable that Congress intended this result.

The holding of the Court of Appeals results in an unconstitutional application of the Act of August 20, 1954, 68 Stat. 745, 18 U.S.C., 1958 ed., Section 3486, for the reason that when petitioner testified before the Senate Committee, he had a right to know whether the Immunity Act of 1948 prohibited the use of his testimony in later criminal proceedings, or whether the Act of 1954 superseded and repealed the former Immunity Act. This is especially apposite since the decision of the Court of Appeals is the first judicial pronouncement that the Act of 1948 was repealed and not amended. Where reasonable minds may differ as to the application of the later Immunity Act, the same should be construed in favor of the petitioner so as to afford him procedural

due process of law. An act, though constitutional, may in its application become unconstitutional. As applied by the opinion of the Court of Appeals to the facts in the case *sub judice,* the Act of 1954 would be unconstitutional. If the petitioner, instead of relying on the Immunity Act of 1948, had refused to testify, the government could not have used *his testimony* to convict him. Having testified under subpoena and through coercion before the Senate Committee, he should not now be stripped of all statutory and constitutional guarantees.

2. Assuming *arguendo* that the Act of 1954 repealed the Immunity Act of 1948, the second question presented by this case is the kind and quantum of evidence which the government must adduce before admissions may be introduced into evidence. As stated, it was essential that the government prove that the petitioner was an authorized labor representative and his testimony before the Senate Committee used to prove this fact was in the nature of admissions or confessions and requires corroboration. This Court held in *Opper v. United States,* 348 U.S. 84, at page 89, as follows:

> "In the United States our concept of justice that finds no man guilty until proven has led our state and federal courts generally to refuse conviction on testimony concerning confessions of the accused not made by him at the trial of his case . . . (p. 90) We think that an accused's admissions of esential facts or elements of the crime, subsequent to the crime, are of the same character as confessions and that corroboration should be required . . . (p. 91) Facts admitted that are immaterial as to guilt or innocence need no discussion. But statements of the accused out of court that show ele-

ments of the crime, here payment of money, necessary to supplement an otherwise inadequate basis for a verdict of conviction, stands differently. Such admissions have the same possibilities for error as confessions. They, too, must be corroborated."

And continuing on page 93, this court said:

"However, we think the choice rule to be that the corroborative evidence need not be sufficient, independent of the statements, to establish the *corpus delicti*. It is necessary, therefore, to require the Government to introduce substantial independent evidence which would tend to establish the trustworthiness of the statement. Thus, the independent evidence serves a dual function. It tends to make the admission reliable, thus corroborating it while also establishing independently the other necessary elements of the offense. . . . It is sufficient if the corroboration supports the essential facts admitted sufficiently to justify a jury inference of their truth. Those facts plus the other evidence besides the admission must, of course, be sufficient to find guilt beyond a reasonable doubt."

The case of *Smith v. United States,* 348 U. S. 147, involved an income tax criminal prosecution, which was based on the government's theory of net worth. The first issue before the court was whether the requirement of corroboration should be applied to the crime of tax evasion. The Court held:

"As to this crime it cannot be shown that the crime has been committed without identifying the accused. Thus we are faced with the choice here of applying the corroboration rule to this offense and

> according the accused even greater protection than the rule affords to a defendant in a homicide prosecution, . . . or of finding the rule wholly inapplicable because of the nature of the offense, stripping the accused of this guarantee altogether. We chose to apply the rule, with its broader guarantee, to crimes in which there is no tangible *corpus delicti,* where the corroborative evidence must implicate the accused in order to show that a crime has been committed."

The Court then held that the defendant's statement as to his opening net worth must be corroborated.

In light of the *Opper* and *Smith* cases, supra, counsel for petitioner objected to the introduction of petitioner's testimony before the Senate Committee, which objection was overruled. The Court of Appeals held that the witness Hoffa testified that the strike at Exhibitors Service Company had come to his attention and that he may have discussed the matter with petitioner. The Court then stated that "Shortly thereafter appellant came to Pittsburgh and sought to promote a negotiated settlement of the strike." (App. 7a). The only affirmative evidence in the record as to when the witness Hoffa discussed this matter with management was the testimony of the witness Callahan. This witness testified he first met Hoffa on January 27, 1958. The indictment variously charges petitioner with receiving payments on or about December 21 and 28, 1957 and January 29, 1958. The record, therefore, does not sustain the finding of the Court of Appeals that the chronology of events is some indication of petitioner's representative status. The Court of Appeals further found petitioner was "recog-

nized as a representative of higher authority in the Teamsters' organization" (App. 8a). It is submitted that even if we assume that there was evidence to find that petitioner was a representative of higher authority in the Teamsters' organization, such a finding does not establish that petitioner was a representative within the meaning and intent of Section 302 (b) of the Labor Management Relations Act of 1947, which requires that petitioner be found to be a representative of the employees of the employer alleged to have paid him the money.[1]

U. S. v. Ryan, 350 U. S. 299, did not decide whether any official of a union is *ex officio* a representative of employees under Section 302 (b) of the Labor Relations Management Act of 1947. In *Brennan v. United States,* 240 F. 2d 253, (C.A. 8, 1957), cert. den. 77 S. Ct. 718, it was held that the term "labor representative" "includes any person who is empowered, authorized or designated in any way, directly or indirectly, by any employee or employees, to represent such employee or employees in any matter relating to their wages or hours or working conditions by standing in the place of such employee or employees in any responsible dealing with the employer involving such matters." The opinion of the Court of Appeals does not define whether petitioner's conviction is affirmed on the basis of being a representative in an *ex officio* capacity or whether the conviction is affirmed on the basis of being a representative of the employees of the employer, Exhibitors Service Company. If the

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1. The Act of September 14, 1959, Pub. L. 86-257, Title 5, Section 505, 73 Stat. 537, 29 U.S.C. 186 amended this requirement but is not here material as the events occurred prior to the enactment of said amendment.

affirmance of the conviction by the Court of Appeals is on the former, it fails to consider whether the petitioner is within the purview of the Act as charged in the indictment, and if on the latter, there is no evidence to sustain a conviction.

The fact that the admission or confession consisted of testimony before a Senate committee does not clothe it with such consideration by the courts as to trustworthiness as employed by the Court of Appeals. In fact, a mere reading of the record of Senate committee hearings makes it apparent that witnesses are in greater need of constitutional protection in Senate committee hearings than in mere instances of admissions or confessions made elsewhere.

Rather than narrowing the applicability of the *Opper* and *Smith* cases, *supra,* compelled admissions secured by subpoena surely stand on a different footing than voluntary statements and require at least strict compliance with the rules set forth in said cases.

3. The petitioner was subpoenaed to testify before the Senate Committee on Improper Activities in the Labor or Management Field. He was called as a witness, the oath administered and questioned extensively by Committee members. He was represented by counsel. His testimony is printed in Part 37 of the hearings before the Senate Committee on Improper Activities in the Labor or Management Field, 85th Congress, Second Session, on hearings held November 5, 1957: May 9, August 13, 14, 15, 19 and 20, 1958, page 14059. Had petitioner refused to appear, he could have been prosecuted criminally under the provisions of 2 U. S. C. Section 192. The testimony used to convict him was brought out by repeated Committee questions. The use of his testimony in the criminal prosecution contravenes the Fifth Amendment.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari should be granted.

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